STATE OF MICHIGAN
IN THE SUPREME COURT

Appealed from:
Oakland County Circuit Court
Juvenile Division
Circuit Court Case No. 07-739244-NA

Court of Appeal Case No. 318855

In re Nykyla McCarthy.

APPLICATION FOR LEAVE TO APPEAL

SUPPLEMENTAL BRIEFING

April 17, 2015

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NOTE: No fee required, appointed counsel.

STATEMENT OF APPEAL

Respondent-Appellant Tracy Reed appeals as of right the August 29, 2013 Order of the Oakland County Circuit Court terminating her parental rights to her child Nykyla McCarthy pursuant to MCL 600.308(1)(a), MCR 3.993(A)(2), and MCR 7.203(A)(1). The Court of Appeals affirmed the trial court's decision.

This court has jurisdiction pursuant to MCR 7.301(A)(2). Appellant is requesting that this Court reverse the Court of Appeal's January 15, 2015 Order affirming the Oakland County Circuit Court order terminating her parental rights to Nykyla McCarthy.

The decision of the Court of Appeals is clearly erroneous and will cause material injustice or the decision, pursuant to MCR 7.302(B)(5).

This Court ordered supplemental briefing.

QUESTION FOR REVIEW

I. WAS THERE CLEAR AND CONVINCING EVIDENCE THAT TERMINATION OF PARENTAL RIGHTS WAS IN NYKYLA'S BEST INTERESTS GIVEN THAT SHE WAS FOURTEEN YEARS OLD, SHE DID NOT WANT HER MOTHER'S RIGHTS TERMINATED, AND THE L-GAL RECOMMENDED AGAINST TERMINATION?

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STATEMENT OF FACTS

Introduction

The Department of Human Services ("DHS") filed a Petition against Respondent-Appellant Mother Tracy Reed ("Mother"). DHS sought for the for the court to take temporary jurisdiction of Mother's oldest daughter, Jasmine Nabers (DOB 1/19/1995) on April 4, 2009, and Jasmine was removed from the home. On January 26, 2010, DHS amended the Petition to include Mother's three other children, Nykyla McCarthy (DOB 06/02/1999), Kyle Reed (DOB 7/24/1997), and Robyn Reed (DOB 7/11/2005). After a jury trial on February 4-5, 2010, the court took jurisdiction of the four children. Jasmine continued in foster care and the other three children remained with Mother.

On April 27, 2010, the court adopted DHS's Parent-Agency Agreement ("PAA"). A series of review hearings and permanency planning hearings were held. Eventually, the other three children were removed from Mother's care. DHS filed a Petition to terminate mother's rights to the four children on March 29, 2011. After the trial and best interests hearings, the court found that there was a statutory basis to terminate Mother's rights to all four children. In doing so, the court found that it was in the best interests of Jasmine, Kyle, and Robyn to terminate Mother's parental rights. The court entered an order terminating Mother's Parental rights to Jasmine, Kyle, and Robyn on January 17, 2012.[1] With respect to Nykyla, however, the court found that it was not in Nykyla's best interests to terminate Mother's parental rights and ordered that DHS continue further

[1] Mother appealed that order and this Court affirmed. COA Case No. 308818.

reunification efforts. That Order terminating Mother's rights to her other three children was appealed and that Facts Section is incorporated herein. COA Case No. 308818 Appellant's Brief. See Appendix 1.

On March 5, 2012, the court adopted a new PAA with regard to Nykyla only. After two more review hearings and a permanency planning hearing, the court determined that DHS should file a supplemental Petition to terminate mother's parental rights

On December 7, 2012, DHS filed a supplemental Petition for the court to terminate Mother's parental rights pursuant to MCL 712A.19b(3)(c)(i) (failed to complete PAA), (3)(g) (failed to provide proper care and custody), and/or (3)(j) (reasonable likelihood of harm if child is returned to Mother). The statutory basis trial was held on March 14, 2013, and the best interests hearing was held on May 1, July 15, and July 30 of 2013. The court issued an Opinion and Order on August 29, 2013 terminating Mother's rights to Nykyla.

Initial Petition

Mother had been involved in neglect cases twice before, once after Mother had a "mental breakdown" in 2000 and again after Mother physically abused Jasmine in 2007. The precipitating incident this time was another physical altercation between Mother and Jasmine involving a cell phone. Nykyla and Kyle witnessed the fight and called the police. At the time, Mother and Jasmine each reported that the other was the initial aggressor. The Petition also alleged that there was no furniture in the family home.

March 5, 2012 - Review Hearing

A new PAA was presented at this court hearing. The goals in the PAA were for Mother to: (1) attend court hearings and maintain contact with the agency; (2) attend and participate in weekly individual therapy with an approved therapist; (3) have weekly telephone contact with Nykyla; (4) complete a home assessment through the Interstate Compact; (5) provide documentation of legal residence and up-to-date utilities; and (6) provide a verifiable source of income. Tr. 10-12 (March 5, 2012).

June 11, 2012 – Review Hearing

The court reviewed Mother's progress with the PAA. Mother had not provided proof of income. Tr. 6 (June 11, 2012). Mother had provided a lease. Tr. 7. The court indicated that it would "check that off the list in terms of what" Mother needed to complete. *Id*. The court ordered Mother to fax income verification within three business days. Tr. 10. The prosecutor indicated the utility papers were provided. Tr. 11.

The prosecutor indicated that the main concern was verifying whether Mother had completed the parenting class. Tr. 11. The DHS worker then detailed the steps she had taken to verify that it was a legitimate and suitable parenting class. Tr. 12-13. The court then stated that Mother decided to move to Georgia, knowing that it was going to make the reunification process more challenging. The judge stated, "frankly, I got to put the burden on you because I can't chase folks around Georgia." Tr. 15. The prosecutor agreed that the onus needed to be on Mother, further stating that the Interstate Compact paperwork would be going through shortly and that Mother would have to avail herself of classes approved by the DHS counterpart in Georgia, the Division of Family and Children Services ("DFACS"). Tr. 16. The court ordered Mother

to provide proof of her parenting class within 14 days or take a new parenting class. Tr. 32.

The court noted that the home assessment had not been completed yet because Georgia had not scheduled it yet and that it was not Mother's fault. Tr. 17. DHS said that Mother would just have to wait for DFACS to contact her. Tr. 18.

With regard to visits, the DHS worker indicated that Mother needed to provide the worker with notice when she was coming to town so that the worker could accommodate the visits. Tr. 22-23.

In conclusion, the judge said, "I really don't want this to be about like jumping through this hoop and jumping through this hoop. I want it to be if Ms. Reed's home is appropriate, safe and Nykyla can return to her and be cared for there, I'll sign that order." Tr. 30.

July 30, 2012 Review Hearing

Nykyla was present at the hearing for the first time. Tr. 3 (July 30, 2012).

Initially, the court indicated that it looked like there had been some progress. Tr. 5. DHS had received verification of the parenting class. Tr. 5-6. Mother had submitted a lease and paid utilities bills. Tr. 6. With regard to employment, Mother did provide proof of employment in the form of her 2011 tax returns. Tr. 7.

With regard to the home study, DHS report indicated that there hadn't been a home study, but that wasn't because of Mother. Tr. 6. DHS indicated that there had been a home study completed, but it was not done by DFACS. Further, the worker stated that "DFACS still has to complete their home study because otherwise Nykyla could not be sent there." Tr. 6. At that time, the worker on the case, Ms. Johnson,

stated that "I do have a home study in my hands done by a private agency in Georgia that -- I spoke with someone today. They assessed the home and found it to be -- I did -- the residence is well suited for family occupancy. . . . . So there is a home study."

Tr. 6-7 (emphasis added).

With regard to counseling, the court indicated that it would be comfortable with Mother continuing with the biblical counselor that she had been seeing, despite the fact that she was not a traditional therapist. Tr. 7. The court stated Mother should continue to her therapist the next 90 days. Tr. 14, 22.

With regard to visits, the DHS worker stated that Mother had not come to Michigan to see Nykyla enough. She only came in December. Further, when Mother was here, she did not spend enough time with Nykyla. The court stated that "I'm of the opinion that she should have had Nykyla basically every day that she was here. If you're only here twice a year, she needs to see her the entire time she's here." Tr. 10. Mother stated that she had come in December, February, and June. She saw Nykyla every day. Mother did her hair and went shopping with her. She also stated that she bought Nykyla a tablet, and that they Skype every day. Tr. 10-11. The court asked Mother to come up to Michigan once a month. Tr. 11. Mother indicated that she would try to do that, but that it might be a financial hardship. She spent $800 on the plane ticket to come to Nykyla's graduation. Tr. 11-12. The court responded that "I empathize to a certain extent, but that's the – while the proceedings are open [you removed] yourself to another state. That's the . . . frustration I have." Tr. 12 (emphasis added). The court ultimately asked Mother to do two face-to-face visits with Nykyla "that include

hugs and shared meals and that type of thing" in the next reporting period. Tr. 26. However, the court added that "if they have to facilities for Skype, let's do Skype." Id.

The DHS worker at the time, Ms. Johnson, stated that, "It is the agency's position that serious consideration should be given to changing Nykyla's permanency plan not to terminating Ms. Reed's rights. And I want to be very clear about that. I don't think that that is in Nykyla's best interest at this time." Tr. 13 (emphasis added). The prosecutor indicated that they were "certainly not moving in the direction of termination of parental rights." Tr. 14 (emphasis added).

The court also said it was happy with the progress that Mother had made. "I feel like -- quite frankly I feel like more progress was made in the last reporting period than has been made in a long time." Tr. 14. If Mother did what she asked her to do during that hearing, the court said it was "comfortable with reunification." Tr. 14-15. The court required Mother to: (1) have two face-to-face visits and ongoing telephone contact with Nykyla, (2) continue therapy with biblical counselor, and (3) pass a DFACS home study. Tr. 22. At that point, the court said it would consider reunification with in-home services. Id.

With regard to the DFACS home study, Mother immediately informed the court that it would take a long time to complete the home study and that she was not going to pass it because she had a felony on her record. Tr. 23. Despite that information, the judge did not alter her decision that DFACS had to do the home study. The judge indicated that the home study was to "make sure that the home is physically appropriate and space and clean and that type of thing," (Tr. 24) apparently disregarding the fact

that the worker had just indicated that there was a home study saying that the residence was well-suited for family occupancy.

The L-GAL indicated that Nykyla wanted to return home to Mother. TR 25-26. Mother's attorney relayed an incident to the Court about a phone conversation between Nykyla and Mother. The DHS was had told Nykyla that Mother wasn't getting her stuff together, so Nykyla called Mother very upset and crying, and saying that, "I'm not coming home so it's your fault, mom." TR 28.

The court addressed Nykyla. She told her that, "You control very little of this though." The judge further indicated that Nykyla shouldn't be having conversations of the details of the case in terms of Mother's progress towards reunification. TR 29-30. Nykyla addressed the court. She stated, "I don't just get mad. I get frustrated with – It's like all this stuff is going on and no one's giving me any progress. I just get frustrated. It's like nobody's telling me what's going on with my mom." TR 30. The judge explained that if Nykyla had frustrations, she should talk it out in therapy or talk to the L-GAL. TR 30-32.

October 29, 2012 Permanency Planning Hearing

The tenor of the case changed again at the next hearing.

With regards to visits, DHS said they had not gotten any verification that Mother had visited Nykyla in Michigan, "like a copy of a plane ticket or anything to actually prove that mom was there." Tr. 6 (October 29, 2012). Mother indicated that she had been to Michigan twice, once by car and once by plane. Tr. 20. The court found that Mother had not met that requirement because the visits were not verified, although the court did not indicate how Mother could prove she made a car trip. Tr. 27.

With regard to therapy, the DHS worker indicated that Mother discontinued therapy in September, but that she had made good progress while she was doing it. Tr. 6, 25.

DHS also indicated that the home study was not passed due to "lack of cooperation and missing documentation," but that DFACS did not specify exactly what documents were missing. Tr. 27.

The parties discussed the permanent plan for Nykyla. Nykyla was placed in a non-relative foster care placement. The foster Mother had indicated that she was not interested in being a guardian. TR at 7. She "doesn't have the time and ability hto devote to raising her, driving her, getting where she has to go. . ." TR 24. There was a mention of a party being interested in guardianship of Nykyla, but only if Mother's rights were terminated. TR 33. The L-GAL reported to the court that Nykyla wanted to be with her mother. TR 22.

The court determined that DHS should file a petition to terminate Mother's rights. Her reasoning was that Mother could not verify her visits, that Mother discontinued therapy, and that Mother didn't pass a DFACS home study. Tr. 27.

March 14, 2013 Statutory Basis Trial

Lori Lambertsen, Foster Care Case Manager for Ennis Center for Children, testified. Her job is to provide case management services to children and their birth families by making referrals, and to monitor the Parent-Agency Agreements. Tr. 6 (March 14, 2013). She authored the Supplemental Permanent Wardship Petition for Nykyla McCarthy Tr. 7. Nykyla entered care on November 19, 2011 due to physical

abuse allegations regarding her sister Jasmine. Id. Nykyla specifically was brought into care when Mother fled to Georgia with Nykyla and her sister. Tr. 8.

Mother was to complete a PAA. Mother needed to maintain emotional stability and demonstrate appropriate parenting skills, including engaging in appropriate visitation with Nykyla. Mother also needed to provide proof of legal and adequate income. She was also to provide proof of adequate housing and proof of income. Tr. 8. Further, she needed to go to counseling. Mother went for a year. However, Mother was supposed to continue in counseling until Nykyla was returned. Tr. 9-10. Lambertsen had gotten emails from the counselor stating that Mother had gone to therapy and that she had benefitted. Tr. 48-49. The therapist did not say that she thought further therapy was needed, and Lambertsen never specifically asked her. Tr. 49.

Mother completed parenting classes. Tr. 10, 48. However, Mother did not provide proof of legal source of income. Tr. 12. Mother did not make attempts to see Nykyla at all. Tr. 15. Mother had a valid lease. Tr. 36.

The DFACS home study was denied. The report merely stated that Mother was not cooperative. Lambertsen stated that Nykyla would have been returned home if the home study was completed. Tr. 15. When Lambertsen got on the case in August, the plan was to return Nykyla to Mother in Georgia. Id.

Lambertsen thought that Mother's rights should be terminated because Nykyla needed permanency. Tr. 16.

On cross, Lambertsen reiterated that she did not know the specific reason that Mother failed the home study. She was aware that Mother had told DHS that she was

going to fail it. Tr. 19-23. She tried to get additional information about the home study numerous times. Tr. 25. She did not know whether Lansing sent a request for a home study of a parent or a home study for a relative licensing, but did state that Mother would have failed a relative licensing study in Michigan. Tr. 25. After Mother's home study was denied, Georgia said they could not reopen the case to do another home study. Tr. 29. In order to reopen the case, Ms. Reed would have to put in writing that she accepted responsibility for her non-compliance and was willing to provide whatever Georgia wanted her to do. Tr. 29. No one conveyed that information to Mother. Id.

Ms. Reed paid for her own home assessment to be done by a private agency, but Lambertsen stated that it's not acceptable. Tr. 32. She had not looked into whether the agency was an agency that generally contracted with DFACS because it didn't meet the Interstate Compact procedures regardless. Tr. 33 No one tried to reopen the case because Mother said she was moving back to Michigan. Id. Mother was told how to reopen the case two days before DHS recommended terminating Mother's rights. Tr. 34.

Mother told her that she visited on October 12th, but Lambertsen could not verify it because there were conflicting stories from relatives. Tr. 39. However, Nykyla stated that Mother visited her. Tr. 43. They did have frequent phone contact and communicated on Skype almost daily. Tr. 45-46. The communication was appropriate. Tr. 69.

On cross by the L-GAL, Lambertsen indicated that Mother was aware of some of the issues that Nykyla was having at school. Mother was notified that Nykyla had been suspended and they talked about it. Tr. 64.

Mother **Tracy Reed** then testified on her own behalf. Tr. 79. She stopped seeing the counselor because she had a scheduling conflict and they had moved on from counseling to more general biblical studies. Tr. 88. She had sufficient income.

With regard to the DFACS home study, Mother received a notice from DFACS that they had received a request to complete a home assessment as a possible relative placement. Tr. 91. DFACS told her that they couldn't do anything about it because that's how the request was sent. They explained to her that, since she had a felony and was on the central registry, her application was going to be denied. Tr. 98. The DFACS worker then gave her some phone numbers of contracted agencies so she could pay for an independent home assessment herself. Tr. 99-101. Originally, the DHS worker in Michigan stated that the independent home assessment would suffice because all they needed was to make sure there was enough room and a bed for Nykyla and food in the refrigerator. Tr. 101, 128. A few days later, however she said it would not be sufficient. Tr. 101-02. DFACS told Mother that the case was closed because they did not get Mother's medical records. Tr. 107. When Mother asked DHS whether she should just move back to Michigan because DFACS denied her home study, the worker told her it was not necessary because they had everything they needed, including pictures, from the independent home study. Tr. 128.

Mother stated that she visited Nykyla in Michigan twice and maintained almost daily Skype contact with her. Tr. 112-115. Mother bought Nykyla a tablet so they could Skype and then replaced it when Nykyla lost it. Tr. 114.

Mother said she provided financial support for Nykyla as well. Tr. 115. She sent her a pre-paid debit card and would send money through Mother's father. Tr. 115.

The judge made statements from the bench. Tr. 153-157. She did specifically state that she was not making official, full factual finding. Tr. 155.

May 1, 2013 Best Interests

Grace Anderson, Mother's counselor testified. Tr. 13. She met with Mother approximately 30 to 35 times. She indicated that she helped her deal with family issues, how to raise children in a proper manner, and how to rectify some of the issues that she had encountered in her prior days. They also discussed appropriate discipline. She stated that Mother realized she made a lot of mistakes and that she didn't want to make the same mistakes in the future. Tr. 15-16. She indicated that further counseling would be helpful when Nykyla came home. Tr. 17, 19. Mother would have an adequate support system in Georgia. Tr. 18. She had no concerns that Mother discontinued therapy because she was working, was in church, and had her plan together. Tr. 19. She believed that Mother would be able to take care of Nykyla if she were returned to her. She believed that Mother had learned and grown through her time with her. Tr. 21-23.

July 15, 2013 Continued Best Interests

Lori Lambertsen testified again. Tr. 7. She stated that she thought it was in Nykyla's best interests to have Mother's rights to be terminated. Nykyla has been in care for approximately two and a half years. She didn't have a relationship with Mother, mostly memories. Nykyla is at a delicate and very impressionable age where she needs structure and stability. She is starting to get in trouble at school. Mother has failed to provide those things for Nykyla. Tr. 7-8. She didn't believe that Mother would be able to provide those things in a short time because there's no evidence that she

would be able to. DHS doesn't know where Mother lives or her current income. There was no communication with between Mother and DHS. The lack of stability affected her ability to form relationships with her foster parents, family, and friends. Not knowing whether Mother was going to be in her life was affected her negatively. Tr. 8

She did admit, however, that the crux of the case was the DFACS denial of her home study. Tr. 18. Her belief that Mother could not provide for Nykyla a safe and stable environment was the fact that there wasn't an approved home assessment. Tr. 24.

Mother and Nykyla's relationship was more like a friendship relationship. Tr. 26. Because they did not see each other face-to-face, they could not have a parent-child bond. Tr. 27. In order to have that kind of bond, Mother would need to discipline her appropriately and assist in her educational and emotional needs. Their phone conversations are not long and in depth. Lambertsen had not seen any kind of physical interactions in between them. Tr. 31. She did not see Mother take the steps that a parent needs to take in order to parent her child despite the fact that she was given an opportunity to do so.

Dr. Douglas Park testified. Tr. 36. It was his opinion that it was in Nykyla's best interests to terminate Mother's parental rights. He didn't think she could adequately parent her. They had more of a friendship relationship. Tr. 42. He walked through his psychological evaluations. With regard to Nykyla, she had unpredictable behavior, and her emotions were hard to control. She was also passive-aggressive and pessimistic, with some depression. Tr 56-57. She did not follow directions, did not listen, and was disrespectful. Tr. 63. Nykyla was also getting in fights in school. Mother said the

solution was for her to change schools. Dr. Park thought that would not be sufficient, which demonstrated that Mother did not have insight and had not made progress in terms of her parenting skills. Tr. 59-60. She continued to state that her children should not have been removed. Tr. 59. However, he did indicate that Mother told him that she would not use physical discipline, which was the issue that brought the case into care. Tr. 61. However, he thought that Mother would revert back to her original parenting style. Tr. 61. Even though he stated that Jasmine was indeed different from her other children, he indicated that Mother would treat them the same. Jasmine had problems fighting, running off with men, and going AWOL, but Nykyla had none of those problems. Tr. 63. Dr. Park also admitted that he had never spoken to Mother's therapist to see what progress she had made in counseling. Tr. 64.

Nykyla testified. She indicated that living in foster care was stressful to her because she wanted to go home to live with her mother. Tr. 69. She stated that she talked to her mother on the phone or via Skype almost every day. Tr. 69. She stated that she had seen her mother about once a month. Tr. 70. Nykyla indicated that she didn't tell her mother about her grades because they weren't that good and she wanted her mother to be proud of her. Tr. 73. She was also disappointed because she felt sad because she thought things were going well, but then she found out they weren't. Tr. 79. She was also annoyed because the worker was being negative about her mother and would "throw her under the bus." Tr. 80. With regard to her problems fighting at school, she said that just by walking down the hall other students would want to fight her. She didn't want to fight, but she had to do something or else get called "stupid stuff" by her peers. Tr. 81-82. Again, she stated that she didn't want to tell her mother.

When she eventually told her mother, she was ashamed. Tr. 82. Her mother would give her instructions on what to do differently. Tr. 82. She thought that her mother would discipline her verbally, not by hitting her. If her mother did hit her, she would tell someone. Tr. 83. She would feel comfortable living with her mother, and that is what she wanted to do.

On cross from the L-GAL, Nykyla indicated that she was never afraid of her mother and always wanted to go back home. Tr. 85. She had seen the fights between Mother and Jasmine, but Mother never got into those kinds of fights with herself or her brother. Tr. 86. From her perspective, Jasmine had always done something like act bad or pushing her mother. Mother never just got mad and lashed out. Tr. 86-87. She also indicated that Mother had a two-bedroom apartment in Georgia. Tr. 87.

Mother then testified. Tr. 91. At one meeting, DHS said the plan was to return Nykyla back home and that the only thing left to do was the home study. The DHS worker indicated to her that she said the only thing that she needed to know was that Nykyla had a bed in Mother's house. TR 94.

The worker said that Mother and Nykyla had a good relationship, that they had a good bond, and that they were close. Tr. 100. She also communicated well with the foster mother and would talk to Nykyla about any issues. Tr. 101. Nykyla and Jasmine are two totally different people, like night and day. Mother didn't have the same issues with Nykyla that she had with Jasmine. Tr. 102. At 14 years old, Jasmine was totally different. She would run away, have sex in my house, steal, hit her, and hit the other kids. Tr. 112. She has a very, very good relationship with Nykyla. Tr. 102.

Mother described what she learned in therapy. Ms. Grace told her to deal with an issue out of love, never out of anger. When you deal with stuff out of anger, it will spiral down. Tr. 103. Previously, she felt like she dealt with Jasmine it was out of anger and not out of love because she didn't understand why she was doing the things that she was doing. Tr. 104.

Mother made a final statement about her ability to parent Nykyla. She believed that, based on the one year of counseling and the two sets of parenting classes, she was equipped to help Nykyla if that time ever came. Tr. 105. She believed she could provide a stable home for her. She wanted her daughter home, but Nykyla was going to need extra, extra love and attention and support because of everything she's been through in the past three years. Nykyla was diligent, hadn't ran away, hadn't messed with boys, and didn't have issues that other 14-year-olds did because Nykyla wants to be good. She wants people to appreciate her and does not want anybody to be disappointed in her. Tr. 106.

She also learned in therapy to deal with the system better. Before, she hated the system and the people in it. Now, she realized that she has to put her daughter first no matter what and just do what she was supposed to do. Tr.117. She felt like she was bullied. She felt like every time they made me a promise, they turned on the promise. Even from the very beginning, she was told that only Jasmine was going to be on the petition to take temporary custody of the children. Tr. 121. Nevertheless, she admitted that she contributed to the problem. She resisted and fought. She fought the only way she thought she could, which was to say she was sovereign and not subject to the jurisdiction of the state. She left Michigan to get a job. Tr. 122.

The judge set another date for the parties to give closing arguments. Tr. 124.

July 30, 2013 Continued Best Interests

The parties gave their closing arguments. Mother's attorney argued that there was never any evidence that Mother abused or neglected Nykyla. Tr. 9. He further pointed out that all parties agreed that Nykyla would be reunited with Mother after a successful home study, and that Mother was only missing one document for the DFACS home study. Tr. 12.

The L-GAL recommended that Mother's rights not be terminated. Instead, he stated that a guardianship would be the best alternative for Nykyla so that she could have stability and permanency, while leaving open the possibility that Mother could one day get her things together and come request that guardianship be terminated. Tr. 22-23.

The judge concluded by saying that she would issue a written opinion. Tr. 23-24.

Court's Opinion and Order

The court issued an Order Following Hearing to Terminate Parental Rights on August 29, 2013. The Order did not state a basis for termination under MCL 712A.19b.

The court issued a written opinion on the same date. The opinion stated the court previously found there was clear and convincing evidence that that there was a statutory basis for terminating Mother's parental rights. The court set this forth in an order dated January 23, 2012. That was the order from the first trial when the court found that termination was not in Nykyla's best interest. The court set forth no factual or legal findings based on the most recent termination trial. Instead, the opinion

proceeded straight to the best interests findings.

Procedural History

Mother appealed from the August 29, 2013 Order of the Oakland County Circuit Court terminating her parental rights to her daughter Nykyla McCarthy (DOB 06/02/1999). On its own motion, the Court of Appeals ordered on November 8, 2013 that Appellant file a delayed application for leave to appeal within 21 because it determined that Appellant's Claim of Appeal was not filed timely. On December 2, 2013, Appellant filed a Motion to Reconsider, arguing that the Claim of Appeals was indeed filed timely. The Court of Appeals denied this motion and ordered Appellant on December 16, 2013 to file the Delayed Application for Leave to Appeal within seven days. Appellant filed the Application on December 23, 2013, which was denied by the Court of Appeals on January 29, 2014.

Appellant filed her Application for Leave to Appeal with this Court on February 25, 2014. This Court remanded this case to the Court of Appeals for consideration as on leave granted.

Appellant filed her appeal with the Court of Appeals on May 12, 2014. On September 23, 2014, the Court of Appeals remanded the case back to the trial court to make brief, definite, and pertinent conclusions of law regarding the statutory grounds for termination.

The trial court issued an Order on remand with the required conclusions of law on December 12, 2014.

The Court of Appeals issued its Opinion of Remand affirming the trial court order terminating Mother's parental rights. Mother filed an Application for Leave to Appeal on

February 12, 2015, and this Court ordered supplemental briefing on March 26, 2015.

ARGUMENT

Standard of Review

The trial court's decision that a ground for termination has been proven by clear and convincing evidence, and the court's decision regarding the child's best interest are both reviewed using a clearly erroneous standard. MCR 3.977(J), *In re Rood*, 483 Mich 73, 90-91 (2009). "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id* (internal citations and quotations omitted).

Background – Legal Framework

Parents possess a fundamental interest in the companionship, custody, care and management of their children, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92 (2009). The court may only terminate parental rights if it finds by clear and convincing evidence that one or more of the statutory criteria are met. *Id.* at 101. The petitioner bears the burden of proving a respondent's unfitness. MCR 3.977(A)(3). In a child custody dispute between the parent and an agency, "the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." MCL 722.25(1). Our Supreme Court has described clear and convincing evidence as proof that:

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Evidence may be uncontroverted, and yet not be 'clear and convincing.'

Kefgen v Davidson, 241 Mich App 611, 625 (2000).

Once at least one statutory ground for termination has been established by clear and convincing evidence, the trial court must then make a finding on the best interests of the child. MCL 712A.19b(5), MCR 3.977(F)(1), *In re Trejo*, 462 Mich 341, 360 (2000). MCL 712A.19b(5) states:

> If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

The prosecutor must prove this by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90 (2013). So, a trial court must find that there is clear and convincing evidence that there is a statutory basis for terminating parental rights and a preponderance of evidence that it is in the best interests of the children to terminate parental rights before it can enter an order terminating parental rights.

THERE WAS NOT A PREPONDERANCE OF EVIDENCE THAT TERMINATION OF PARENTAL RIGHTS WAS IN THE BEST INTERESTS OF THE CHILD

Summary of Argument

In this case, the court found a statutory basis for terminating Mother's parental rights. The court further found that it was in the best interests of Nykyla to terminate Mother's parental rights. However, the court did not adequately take into consideration Nykyla's age, her express wishes, and the recommendation of the L-GAL when making that determination. As a result, the trial court's decision was clearly erroneous. This Court should reverse the decision of the Court of Appeals because it is clearly erroneous and will cause material injustice.

Nykyla had been in foster care since around November 19, 2010, at the age of

eleven. Tr. 29 (June 17, 2011). She expressed her desire to return to her mother since she entered foster care. Tr. 22-23 (**December 9, 2010), Tr. 9-12 (January 10, 2011).** At the time of the Best Interests Hearing, she was fourteen and testified that she did not want her mother's rights terminated. The L-GAL recommendend that Mother's rights should not be terminated. Instead, he recommended a guardianship, thus giving Mother additional time to continue to work on reunification. Despite all of this, the court found that it was in Nykyla's best interests to terminate Mother's parental rights.

In the current state of the law, there is not a lot of existing guidance on what the trial court should consider when making a best interests determination. I will review the current landscape of the existing law. Appellant prays that this Honorable Court state with specificity that the age of the child, the child's wishes not to terminate parental rights, and the L-GAL's recommendation to not terminate are factors the trial court should weigh heavily when making a best interests determination in a neglect case. The trial court did not give sufficient weight to those factors. That decision was clearly erroneous. The Court of Appeals clearly erred when it did not reverse the trial court's decision, and it will cause a material injustice.

Current State of the Law

Unfortunately, the statute regarding termination of parental rights and a best interests finding, MCL 712A.19b(5), does not specify what the trial court should consider in making a best interests determination. Unlike the Child Custody Act which sets forth very clearly the best interests factors that the court must consider when deciding a custody or parenting time issue, MCL 722.23, the legislature has not seen fit to give any guidance to the trial court in making a best interests finding in a neglect proceeding.

This Court recently set for a list of factors that trial courts can use in deciding whether termination of parental rights is in the child's best interests: the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home, the parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. *In re White Minors*, 303 Mich App 701, 713-14 (2014), quoting *In re Olive/Metts Minors,* 297 Mich App 35, 41-42 (2012).

Further, the Court of Appeals has given some guidance for making a best interests determination. It is appropriate for the court to consider the best interests factors in the Child Custody Act." *In re JS Minors*, 231 Mich App 92, 102-103 (1998) overruled on other grounds *In re Trejo Minors*, 462 Mich 341 (2000). The child's placement with relatives is an explicit factor to consider in determining whether termination was in the children's best interests. *In re Olive/Metts Minors,* 297 Mich App 35, 43 (2012). Trial courts may consider the age of the child, the respondent's history, psychological evaluations, parenting techniques during parenting time, family bonding, the foster environment and possibility for adoption, and the parent's continued involvement in situations involving domestic violence. See *In re Jones*, 286 Mich App 126, 131 (2009), *In re BZ*, 264 Mich App 286, 301 (2004), *In re AH*, 245 Mich App 77, 89 (2001). However, this Court has yet to issue a ruling expressly adopting any of these.[2]

[2] The SCAO Child Welfare Services Memorandum, Child's Best Interests in Termination of Parental Rights Proceedings p.3 sets forth the following factors that the court should

I. Courts Should Consider The Age of the Child in Making a Best Interest Determination Of An Older Child. The Trial Court Did Not Consider That Nykyla Was An Older Child When Finding That Termination of Parental Rights Was In Her Best Interests.

There is no Michigan Supreme Court case that says that courts should consider the age of the child in determining best interest. There are Court of Appeals cases that implicitly recognize the age of the child in a best interests determination. *In re Jones*, 286 Mich App 126 (2009); *In re AH*, 245 Mich App 77 (2001).

Mother requests that this Honorable Court expressly state that the age of the child could be considered by the trial court. More specifically, trial courts should take into consideration the unique issues facing an older child who suddenly finds him or herself without a parent. The analysis needs to be fundamentally different for older children. They are less likely to be adopted. Pursuing a permanent plan of adoption is illusory. There is a higher risk that the older child will suffer great harm after termination of parental rights in favor of foster care. As the child gets older, it should weigh against a finding that termination is in the child's best interests.

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consider when determining whether termination of parental rights is in a child's best interests:

"The opinion of experts including psychologists and therapists, the caseworker, and the lawyer guardian ad litem, the child's age, the child's wishes, if of a sufficient age to express an opinion, the child's relationship with extended relatives, whether the child has special needs, ethnic or cultural considerations, the length of time the child has been in foster care, and the bond that exists between siblings." Available at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/Documents/TPR-BestInterests.pdf.

Parent attorneys have been relying on this Memo for trial preparation, but this Court has not officially adopted this non-exhaustive list of best interest factors.

Adoptability: Whether there is a possibility that the child would be adopted can be considered when making a best interests determination. *In re White Minors*, 303 Mich App 701, 714 (2014). As the child gets older, the court needs to weigh the likelihood that the child will be adopted. Terminating parental rights so that the child can have permanence and stability is not realistic as the child gets older. Older children are less likely to get adopted.[3] If a child enters the foster care system at age 14 or above, adoptions are rare.[4] An adolescent is 33 times more likely to remain in foster care for the rest of the adolescent's youth than a pre-schooler.[5] Right now in the Tri-County area (Wayne, Oakland, Macomb), there are 99 children waiting to be adopted. Of them, 60 are 14 and older.[6]

Because of this, trial courts should consider that consigning an older child to permanent foster care is not in the child's best interests. In such a case, it might be better to keep the family together and have DHS offer more services to ensure that no harm came to the child.[7]

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[3] McGill, Agency Knows Best? Restricting Judges' Ability To Place Children In Alternative Planned Permanent Living Arrangements, 58 Case W. Res. L. Rev. 247, Fall 2007 at 256.

[4] Margolin, Every Adolescent Deserves A Parent, 40 Cap. U. L. Rev. 417, 419.

[5] Id.

[6] Michigan Adoption Resource Exchange Listed Children Statistics. Available http://www.mare.org/ForFamilies/ViewWaitingChildren/ListedChildrenStatistics.aspx.

[7] The state senate contemplated this when amending the statute regarding permanency planning hearings to accomplish the goals of the Federal Child and Family Services Improvement Act of 2006, 42 USC 675(5)(c). MCL 712A.19a(3) Legislative History, Foster Care Placement. S.B. 668 (S-1)-672 (S-1): First Analysis.

Negative Impact of Foster Care On A Teenager. As the child gets older, there are more long-term negative consequences for terminating the parent's rights. Research on young adults in homeless shelters by the National Association of Social Workers (NASW) indicates "that 38% of the youths surveyed had been in foster care at some time during the previous year alone. An additional 11% had arrived from another runaway or crisis shelter accounting for a total of 49% coming from some out-of-home facility in the previous year . . . ."[8] Less than 50% of youth who age out of foster care have a high school diploma, and fewer than 1% go on to finish college. Close to 27% of all males are incarcerated shortly after aging out, and nearly half of the young women become pregnant. Social isolation is the norm.[9] Balance the harm that could happen at home with the harm that could happen in a series of foster care homes.

Appellant is requesting that this Court explicitly announce that the age of the child is a factor that should be considered when making a best interests determination. Even further, this Court should state that trial courts must take into consideration the negative consequences of terminating parental rights when the child is a teenager.

Lori Lambertsen, the DHS worker, testified that Nykyla needed structure and stability. Tr. 7-8 (July 15, 2013). However, Nykyla was in a non-relative foster care at that point. Tr. 7, 24 (October 29, 2012). How is that a more permanent and stable result for Nykyla? The courts seem to think that permanence and stability can be achieved by terminating parental rights, but that just doesn't reflect reality.

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[8] *Margolin*, at 420.

[9] Id. at 420-421.

Nykyla's foster mother had already indicated that she was not interested in adopting Nykyla or being her guardian. Id. Thus, the placement with that foster mother was not a permanent plan anyway. She was not getting any more permanence and stability by remaining in foster care. At age fourteen, she had a very slim chance of getting adopted. Bouncing from foster home to foster home certainly doesn't give her any more stability and permanence that the DHS worker said she needed. The court did not adequately weigh the fact that Nykyla was a teenager and that she would suffer more than a younger child by severing her relationship with her mother. The court focused on Mother not being cooperative. What's worse for Nykyla? Being placed with an uncooperative parent or continuing to suffer in foster care? She was not placed with a relative. In foster care, she is completely unmoored. Studies show that she would be at increased risk for homelessness, poor education, and general social maladjustment. How does that compare with the psychologist's opinion that Mother may in the future, possibly, not use appropriate discipline? We already know that she was suffering, and had been since she went into foster care. The psychologist said that she was passive-aggressive, pessimistic, and depressed. Tr. 56-57 (July 15, 2013). Absent some compelling proof that Nykyla was very likely to suffer grave harm with her mother, being with her mother was better for Nykyla than being in foster care.

The best interests hearing focused on Mother and the progress she made, rather than on the child. One of the *Olive/Metts* considerations is the parenting ability, but that should not be the overriding concern. The court placed too much emphasis on this. No, she is not the perfect parent, but what is worse for Nykyla? Being in foster care.

The court did not address what was best for Nykyla. The court addressed Mother having enough chances. Mother's progress on the PAA is only one of the things that the court should consider.

II. Courts Should Weigh Heavily The Wishes Of An Older Child When Making A Best Interest Determination. The Trial Court Disregarded 14-Year-Old Nykyla's Wishes That Mother's Rights Not Be Terminated When Finding That Termination Was In Nykyla's Best Interests.

The trial courts can take into consideration the wishes of the child when determining whether termination of parental rights is in the best interests of the child. The Court of Appeals has stated that it is appropriate for the court to consider the best interests factors in the Child Custody Act. *In re JS Minors*, 231 Mich App 92, 102-103 (1998) overruled on other grounds *In re Trejo Minors*, 462 Mich. 341 (2000). *In re Jones*, 286 Mich App 126, 131 (2009). The Child Custody Act, MCL 722.23(i), provides that "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference" is a best interest factor. Therefore, trial courts can weigh the reasonable preferences of the child when determining whether termination of parental rights is in the child's best interests.

Current state and federal law indicate that it is important for courts to consider the child's wishes in making a best interests determination. The federal Child and Family Services Improvement Act of 2006 modified the definition of "case review system" to require states to enact procedures to ensure that courts conducting foster care permanency planning hearings consult with the child, in an age-appropriate manner, regarding the child's permanency plan. 42 USC 675(5)(c). The main objective

is to give children an opportunity to express their opinions in their own words, which will convey to the children that their opinions are valuable to the court.

Michigan adopted the federal requirement with the enactment of 2008 PA 200, which amended MCL 712A.19a(3). The new Michigan law requires courts to obtain the child's views regarding his or her permanency plan during each permanency planning hearing.[10] Thus, other areas of the neglect code make it clear that both federal and state legislatures intend for the courts to strongly consider the child's wishes. Other state legislatures have taken a similar view and expressly codified that the child's wishes should be considered in a best interests determination.[11] Even international law recognizes the important of ascertaining the wishes of the child.[12]

Having discussed the importance of the child's age and the importance of getting the child's opinion in making a determination of the best interests of the child, it is

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[10] See SCAO Administrative Memorandum 2009-2, Obtaining the Child's Opinion at Permanency Planning Hearings. Available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2009-02.pdf.

[11] District of Columbia, Florida, Illinois, Maine, Massachusetts, Ohio, Rhode Island, Wisconsin). See Child Welfare Information Gateway. (2013). Determining the best interests of the child. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. Available at https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/.

[12] UN Convention on the Rights of the Child. Article 12 subsection 1 addresses how important to weigh the child's views in all matters affecting the child. Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3. S Located at http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm. See Peters, HOW CHILDREN ARE HEARD IN CHILD PROTECTIVE PROCEEDINGS, IN THE UNITED STATES AND AROUND THE WORLD IN 2005, 6 Nev. L.J. 966, Spring 2006, for a general discussion of how child protective proceedings around the world and how various nations consider the wishes of the child in child protective proceedings or fall short of complying with Convention on the Rights of the Child.

necessary at this point to discuss how much weight should be given to the wishes of an older child.

Absent compelling circumstances, the child's wishes should be given priority when over 14. It's generally important, but moreso when the child is older and turns 14. At age 14, it should be presumed that a child is of sufficient maturity to make decisions about who controls their life. Indeed, existing Michigan law indicates that age 14 is the "magic number."

At age 14, a child must consent to their own adoption. The Adoption Code provides that every child over the age of 14 must consent to his or her adoption before the court may enter an adoption order. MCL 710.43(2). Pursuant to the Estates and Protected Individuals Code, a child may petition the court for the appointment of a guardian at age 14. MCL 700.5204. This should indicate that children over the age of 14 should have more say in whether parental rights should be terminated.

Nykyla also expressed that she wanted to return home to her mother. Ever since she went into foster care, she wanted to go back home. L-GAL told the court that multiple times during the course of the case. Tr. 22-23 (**December 9, 2010), Tr. 9-12 (January 10, 2011).** Nykyla testified that she wanted to return to her mother's home at trial. Tr. 14 (July 13, 2013). The judge did not take that into consideration. The judge should have given great weight to her wishes. That was not indicated in the judge's opinion. And, given that Nykyla was fourteen, the judge should have made specific findings that there was a compelling reason to disregard her wishes. In this case, there were no compelling reasons. This was not an aggravated circumstances case. Mother had never injured Nykyla, sexually molested her, or neglected her basic needs. Mother did

not have a chronic drug problem that seriously impaired her capacity to parent. Since there was no compelling evidence that militated against Nykyla's wishes, the court should have accepted Nykyla's determination of what her best interests were, what would make her happiest.

III. Trial Courts Should Weigh Heavily The L-GAL's Recommendation. The Trial Court Disregarded The L-GAL's Recommendation Against Termination When Finding That Termination Was In Nykyla's Best Interests

A lawyer-guardian ad litem is appointed to represent the interests of a child. MCL 712A.13a(1)(g); MCL 712A.17d(1); MCL 722.630. Collectively these statutes set forth the duties of a L-GAL. The L-GAL serves as the independent representative for the child's best interests, conduct his or her own independent investigation, meets with or observes the child, assesses the child's needs and wishes, makes a determination regarding the child's best interests, and advocates for those best interests. Because the L-GAL has so much interaction with the child and is concerned for the child's best interests, he is uniquely positioned to make such a recommendation.

In this case, the L-GAL recommended that the court not terminate. That should have been given more consideration. There was no explanation for why it wasn't considered. In fact, all along the L-GAL expressed to the court that Nykyla was suffering in foster care. She was upset and crying when talking to him. Tr. 22-23. **(December 9, 2010).** There were things she had to sort out in therapy.

It is unclear why the trial court disregarded the recommendation of the L-GAL. There was no indication that it was unreasonable or unwarranted. Without some compelling reason, the trial judge should weigh heavily the recommendation of the L-

GAL. The trial judge should have made specific findings for why she disregarded the L-GAL's recommendation. Nonetheless, in this case, it was a perfectly reasonable recommendation. He thought that Mother still needed to work some things out, but he weighed the impact foster care was having on her. She was depressed. Tr. 56-57 (July 15, 2013). She was acting out by getting into fights at school and being disrespectful at her foster home. Tr. 59-60, 63. He was able to see the suffering when he spoke to her. The judge did not have the opportunity to have such interactions with Nykyla, but the L-GAL did. Because of that, the court should have given more weight to the L-GAL's recommendation to not terminate Mother's parental rights.

Finally, the L-GAL in this case agrees with Mother that it is not in Nykyla's best interests to terminate Mother's parental rights. Mother adopts the statements and arguments set forth in the L-GAL's brief.

CONCLUSION AND RELIEF REQUESTED

The prosecutor did not provide a preponderance of evidence that was in the best interests of the child to terminate Mother's parental rights. The court did not adequately consider that Nykyla was 14, that she did not want her mother's rights terminated, and that the L-GAL recommended not terminating parental rights. The court's reasoning did not support a best interests findings. It was clearly erroneous for the trial court to find that termination was in the best interests of the children.

This Court should reverse the decision of the Court of Appeals because it is clearly erroneous and will cause material injustice.

Respondent-Appellant Tracy Reed requests that this Honorable Court REVERSE the Court of Appeal's decision to affirm the trial court and REVERSE the

August 29, 2013 Order of the Oakland County Circuit Court terminating her parental rights to her child Nykyla McCarthy (DOB 06/12/1999) and: (1) remand the case to the Oakland County Circuit Court, Juvenile Division with instructions to order reunification of Respondent-Appellant with her children, or (2) remand the case to the Oakland County Circuit Court, Juvenile Division for further proceedings consistent with this Court's opinion and/or (3) order any other remedy that this Court deems fit and appropriate.

April 17, 2015

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IN THE SUPREME COURT

Appealed from:
Oakland County Circuit Court
Juvenile Division
Circuit Court Case No. 07-739244-NA

Court of Appeal Case No. 318855

In re Nykyla McCarthy.

PROOF OF SERVICE and NOTICE OF FILING

SUSAN LOVELAND states that on April 17, 2015, she served a copy of the Application for Leave to Appeal, Notice of Hearing, and Proof of Service:

Via U.S. mail to:
Stephen A. Raimi (P19195)
Lawyer-Guardian Ad Litem
30800 Telegraph Rd Ste 1705
Bingham Farms, MI 48025

Via e-file to:
Jessica R. Cooper (P23242)
Oakland County Prosecutor
1200 N Telegraph Rd
Pontiac, MI 48341

A Notice of Filing of this Application for Leave to Appeal was served on the clerks of Court of Appeals and trial court.

I declare that the statements above are true to the best of my information, knowledge and belief.

April 17, 2015

Susan L. Loveland